



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 31, 2004

Mr. John S. Aldridge  
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2004-7419

Dear Mr. Aldridge:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208105.

The Mexia Independent School District (the "district"), which you represent, received three requests for a copy of the report by Dori Worley of Hudson, Anderson and Associates presented to the district at a meeting of the district school board on June 14, 2004. You indicate that a redacted version of the report has been released to the requestors. You claim that portions of the requested report are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the submitted report is subject to section 552.022 of the Government Code, which provides in pertinent part:

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<sup>1</sup> We note that in your submission of June 29, 2004, you do not provide comments explaining why section 552.111 should apply to the information at issue. We therefore presume the city no longer intends to claim section 552.111 as an exception to disclosure. See Gov't Code § 552.301(e)(1)(A). You also raise section 552.305 of the Government Code. Section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"), but rather a procedural provision permitting a governmental body to withhold information, the release of which may implicate third party interests, while the governmental body is seeking an attorney general's decision under the Act. Thus, section 552.305 does not itself provide a basis for withholding information from required public disclosure under the Act. See Gov't Code § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code).

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted document is a completed report made for the district. Thus, it must be released unless it is confidential under other law. While you contend that this information is excepted from disclosure under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold any portion of the report at issue pursuant to section 552.103 of the Government Code. We note that section 552.107 is also a discretionary exception under the Act. *See* Open Records Decision No. 676 (2002). However, as the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence, we will address your claim under the attorney-client privilege pursuant to Rule 503. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code). We will also address your claims under sections 552.101 and 552.102 of the Government Code.

You have marked a small amount of information in the submitted report that you contend is protected by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body.<sup>2</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client

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<sup>2</sup> The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

representatives, lawyers, and lawyer representatives.<sup>3</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information you seek to withhold under the attorney-client privilege documents confidential advice communicated to the district by its attorney in the course of the rendition of professional legal services to the district, and you indicate that the confidentiality of this information has been maintained. We find that the accountant to whom this confidential legal advice was disclosed in the course of the preparation of the report at issue is a “representative of the client” for purposes of the attorney-client privilege. *See* TEX. R. EVID. 503(a)(2), (b)(1)(D) (information protected by attorney-client privilege may be communicated between client and representative of client without violating privilege). Based on your representations and our review, we find you have established that the information in the report the district seeks to withhold under the attorney-client privilege is protected by the privilege and may be withheld pursuant to Rule 503 the Texas Rules of Evidence. We have marked the information in the report that may be withheld pursuant to the attorney-client privilege.

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<sup>3</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”)

Next, you have marked information that you contend is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The report at issue pertains to the district's accounting records and is not "information in a personnel file." Thus, we determine that the district may not withhold any portion of the submitted information under section 552.102 of the Government Code.

You also contend that portions of the submitted report are confidential by law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). As noted, the report at issue pertains to accounting records maintained by the district and is not a document evaluating the performance of a teacher or administrator. Thus, we find that the report is not the type of record made confidential by section 21.355, and we therefore determine the district may not withhold any portion of the submitted report pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We also understand you to assert that portions of the submitted report are excepted under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>4</sup> Section 552.101 encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You have marked information in the submitted report that you seek to withhold pursuant to section 552.101 and common-law privacy. We note that the information you have marked pertains to actions taken with respect to district operations and property by employees or

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<sup>4</sup> You indicate that former employees of the district identified in the report "may have third-party privacy interests of the sort contemplated by [section] 552.305." We emphasize that information about an individual that is protected by common-law privacy is considered to be confidential by law for purposes of the Act. Thus, section 552.101 is the appropriate provision of the Act for the district to raise when the district believes information may be protected from disclosure by an individual's right to privacy.

officials of the district. This information is not highly intimate or embarrassing and is a matter of legitimate public interest. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's performance and the circumstances of resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy); *see also* Open Records Decision No. 579 (1990) (information may not be withheld from required public disclosure on basis of concern that disclosure might place individual in false light). We therefore determine the information you have marked is not protected by common-law privacy and may not be withheld pursuant to section 552.101 of the Government Code.

In summary, we have marked a small portion of the submitted report that the district may withhold pursuant to the attorney-client privilege. The remainder of the submitted report is not excepted from disclosure and must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 208105

Enc: Submitted documents

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